BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

LAYNE EBERLE	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,057,877
JOY MASONRY, INC.	)	
Respondent	)	
AND	)	
	)	
TRUMBULL INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) request review of the January 10, 2012 preliminary hearing Order entered by Administrative Law Judge John D. Clark. Paul V. Dugan, Jr., of Wichita, Kansas, appeared for claimant. Timothy A. Emerson, of Overland Park, Kansas appeared for respondent and its insurance carrier.

ISSUES

The Administrative Law Judge (ALJ) found claimant sustained personal injury by accident arising out of and in the course of his employment with respondent on September 19, 2011. Claimant was awarded authorized medical treatment and temporary total disability benefits (TTD) at the rate of $286.81 per week.[1] The ALJ found the post-accident drug testing results offered into evidence by respondent were inadmissable because they did not comply with K.S.A. 2011 Supp. 44-501(b).

Respondent requests review of whether claimant's accidental injury arose out of and in the course of his employment and whether the claim should be denied because claimant's injury was contributed to by his use or consumption of drugs, pursuant to K.S.A. 2011 Supp. 44-501(b).

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[1] The ALJ found claimant's average weekly wage was $430.00 but awarded TTD at the rate of $286.81 per week. The compensation rate should be $286.68. However, the Board does not have jurisdiction on this review to correct the rate.

Claimant argues that the ALJ's Order should be affirmed.

Therefore, the issues to be considered by the Board are:

(1) Did claimant's personal injury by accident arise out of and in the course of his employment with respondent?

(2) Should claimant's claim be denied because his use or consumption of drugs contributed to his injury?

FINDINGS OF FACT

Claimant, who was age 39 when he testified at the preliminary hearing, began working for respondent in November 2010 as a laborer. In addition to his duties as a laborer claimant was learning the skills necessary to become a mason.

On September 19, 2011, claimant was working on a scaffold laying cinder blocks in the process of constructing a wall. He fell approximately 18 feet from the scaffold after his right pant leg got caught on a scaffold pin causing him to swing forward over the wall. Claimant landed on his back on a pallet loaded with construction material. He felt excruciating pain in his pelvis and his legs felt totally numb. Claimant claims multiple injuries, primarily to the lumbar spine and the thoracic spine. Respondent does not deny that claimant sustained an accident on the date alleged.

Claimant was taken to Wesley Medical Center's emergency department via ambulance. He was admitted as an in-patient at 9:45 a.m. Claimant's principle diagnoses were a burst fracture of the L-1 vertebra, with 60% loss of vertebral height with retropulsion into the spinal canal; severe stenosis at the level of the fracture; a right lamina fracture at the same level; a spinous process fracture at T-12; a transverse process fracture at L-2; traumatic herniation of the T-12, L-1 disc; and intra-epidermal hematoma from T-12 to L-4; Claimant was hospitalized for eight days.

On September 20, 2011, claimant underwent surgical treatment performed by Dr. Grundmeyer consisting of a T-12 through L-2 posterior fusion using autograft bone; T-10 through L-2 pedicle screw fixation; and a T-12 laminectomy to relieve compression on claimant's spinal cord. Claimant has not returned to work and has earned no wages since the accident. Claimant is still being held off work by Dr. Grundmeyer and is still under his care.

Claimant admitted to a history of drug abuse. He testified that he was aware of respondent's safety procedures and policies as well as the substance abuse policy, all of which were contained in the employee handbook. Claimant testified he informed respondent that he was participating in a methadone program to assist him in recovering from his addiction to prescription medication, specifically opiates. However, claimant did

not notify respondent of his involvement in the methadone program until after the accident.[2] Claimant had been in the program for a year and at the time of the accident he was clean of street drugs and non-prescribed medications. However, he continued to take methadone prescribed by the Wichita Treatment Center. Claimant took 87 milligrams of methadone every day. Claimant admitted that he took the prescribed dose of methadone before he went to work on the morning of his injury. Claimant testified that he experienced no side effects from taking methadone. The goal of the program was to gradually decrease the doses of methadone and ultimately to stop it completely.

Claimant's blood was tested after the accident, but he did not remember his blood being drawn. Claimant denied that he gave permission for his blood to be drawn. He was not told the results of the drug testing, but it was his understanding that he tested positive for methadone and marijuana. Claimant testified that the only drug he was taking at the time of the accident was methadone. He did not believe that he was impaired on the day of the accident and believed that the positive result for marijuana was a mistake. Claimant refused to answer questions regarding when he last used marijuana, asserting his right against self-incrimination under the fifth amendment to the United States Constitution.

Claimant was subject to regular drug testing as part of his methadone program and, according to him, he had never tested positive for marijuana. Claimant had his monthly drug test as part of the methadone program on October 6, 2011, almost a month after the accident and he did not test positive for anything but the methadone and the pain medication he was prescribed after the accident.

When claimant was admitted to Wesley Medical Center on the day of the injury he was in "extreme pain 10/10."[3] Both before and after surgery, claimant was treated aggressively for pain and was provided by the hospital with pain medications including Dilaudid, a narcotic.

Lee Eberle, claimant's brother, testified at the preliminary hearing. He and claimant lived together and both worked for respondent. Mr. Eberle testified that on the day of the accident he and claimant were working at the same work site and they rode to work together. He did not notice anything unusual in claimant's actions or his ability to maneuver physically on September 19, 2011. He testified that it was an average day.

Mr. Eberle did not witness claimant's fall. He was told directly after the event that claimant had stepped from the stock plank to the walk plank on the scaffold. Claimant caught the inside of his pant leg on a scaffold pin and plunged forward into the wet wall.

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[2] P.H. Trans. at 39. Claimant's testimony about when he told respondent about his participation in the methadone program is inconsistent. P.H. Trans. at 42, 44.

[3] P.H. Trans., Cl. Ex. 2 at 2.

The blocks gave way and claimant fell over the wall. Mr. Eberle followed the ambulance to the hospital.

Mr. Eberle testified that he was with claimant in the hospital on the date of accident, however, he was in and out of claimant's room. He saw nobody get turned away from getting a blood sample. Mr. Eberle testified that he witnessed someone taking a blood sample from claimant in the evening of the date of injury, several hours after claimant had been admitted to the hospital. He testified that the person who took the blood sample said she did not work for the hospital and was simply told to come and draw some blood. He assumed she worked for the insurance company. According to him, claimant was not totally coherent at the time the blood was drawn.

Mr. Eberle testified that as of September 19, 2011, it had been several months since he had seen claimant smoking marijuana. He was not aware of any kind of prescription medication that claimant may have taken on the date of the accident aside from the methadone. While claimant was at the hospital, he was given medication for the pain before the blood was drawn.

Christopher Maxfield, claimant's supervisor at the time of the accident, also testified at the preliminary hearing. According to Mr. Maxfield, claimant was one of his best laborers and he was teaching claimant to be a mason.

Mr. Maxfield was working with claimant on September 19, 2011. He first saw claimant at 7:30 a.m. that day. Mr. Maxfield did not notice anything unusual about claimant that morning. He felt claimant was doing an excellent job with all of his work duties. To his knowledge, claimant was never impaired.

Mr. Maxfield testified that he was working with his back facing where claimant was working, so he did not witness the accident. However, two of the other workers, Raymond Ramos, Jr. and Raymond Ramos, Sr., saw the accident and said that claimant stepped down from one plank to another plank when his pant leg got hooked over a scaffold pin and he fell head first onto a pallet.

Mr. Maxfield testified that there was no immediate discussion between the crew and management after claimant's accident. Everyone just went back to work and then after lunch there was a safety meeting at which time the employees were instructed to make sure everything on the job site was safe because someone would be out to investigate the site and the company didn't want to get fined.[4]

The ALJ found claimant's average weekly wage was $430.00, but awarded TTD at the rate of $286.81 per week. The compensation rate should be $286.68. On the morning

[4] *Id.* at 65-66.

after the accident, Randy Joy[5] asked a few of respondent's employees to fill out some paperwork and instructed them more or less on what to say. Mr. Maxfield was not asked to fill out any paperwork, but that was alright with him because he didn't want to be asked to lie about what happened.[6]

On December 20, 2011, Julie Joy[7] testified by deposition. She described herself as respondent's company nurse, secretary, and treasurer. Ms. Joy wrote respondent's accident and injury policy, safety program policy, and substance abuse policy. She also prepared updated versions of the policies. She testified that every employee is required to read the employee handbook and sign that they understand all of the policies in it. Claimant signed his name several times acknowledging that he read and understood respondent's policies.

Ms. Joy testified that if a work-related accident occurs, respondent's mandatory drug testing policy requires that a drug test be performed by the treating medical facility. She also testified that she randomly selected employees to provide urine samples per respondent's substance abuse policy.

When claimant first started working for respondent, he did not report that he was in a methadone program or that he actively smoked marijuana. Ms. Joy would not have allowed claimant to work at the height he was working if she had known he was on methadone because of the side effects of the drug.[8] Ms. Joy is a registered nurse and she testified that methadone has side effects of dizziness, lightheadedness, and drowsiness, among other symptoms.[9]

Ms. Joy testified that respondent had an agreement with American Medical Services Laboratories, Inc. (AMS) to collect and test all blood and urine samples taken from injured workers. To her knowledge AMS sent a representative to Wesley Medical Center on the morning of the injury to collect a blood sample from claimant for testing. The sample was

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[5] Randy Joy was the supervisor/foreman of all of respondent's jobs and took care of getting whatever anyone needed.

[6] P.H. Trans. at 66.

[7] Julie Joy is presumably related to Randy Joy, however, their exact relationship is not in the record.

[8] Joy Depo. at 14.

[9] An undated medical report of Dr. Drew Schultz of the Wichita Treatment Center was admitted into evidence at the preliminary hearing as claimant's exhibit 4. The report expresses the opinion that if a patient is stable on methadone for at least two weeks, and is not taking any illicit drugs, the patient would have the ability to drive vehicles, operate machinery, and engage in other mental and physical activities.

taken in the late afternoon or evening.[10] Ms. Joy testified that to her knowledge the AMS representative tried to secure a blood sample in the morning of that day, but claimant refused to allow the sample to be taken. Ms. Joy further testified the AMS representative tried to obtain a blood sample on several occasions that day but claimant refused. Ms. Joy is not sure why claimant finally agreed to give the blood sample, but one was taken.[11] Ms. Joy testified that respondent was justified in getting a blood sample because claimant signed the policy and procedure handbook confirming his understanding of respondent's policies and consenting to adhere to those policies.

The drug test results offered into evidence by respondent were positive for marijuana and methadone, however, the results do not show levels of those drugs at or above the thresholds delineated in K.S.A. 2011 Supp. 44-501(b)(1)(C).[12]

Ms. Joy did not witness claimant's accident, however, she testified that her understanding of the accident was that claimant was up in the air and tripped over his feet. She was not aware that his pant leg got caught on the scaffold pin. She also heard from Randy Joy that claimant was running around on the day of the accident and was not being careful. There is no evidence that Randy Joy witnessed the accident. She understood claimant to be a good employee.

Ms. Joy testified she first learned of claimant's methadone use after the accident and confronted him about it.[13] She did not recall claimant telling her about his methadone use prior to this accident.

Ms. Joy believes that claimant was impaired at the time of the accident.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp 44-501b(c) provides:

> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

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[10] The sample was taken at 5:00 p.m. P.H. Trans., Resp. Ex. 2.

[11] Joy Depo. at 15-16.

[12] The blood testing results were positive for Carboxy-THC (Cannabinoids), 14.5 ng/ml, and Methadone (Dolophine), 482 ng/ml.

[13] Joy Depo. at 22-23.

K.S.A. 2011 Supp. 44-508(h) provides:

> (h) "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

The burden is placed on respondent to defeat a workers compensation claim based on claimant's intoxication.[14]

K.S.A. 2011 Supp. 44-501(b) provides in relevant part:

> (b) (1) (A) The employer shall not be liable under the workers compensation act where the injury, disability or death was contributed to by the employee's use or consumption of alcohol or any drugs, chemicals or any other compounds or substances, including, but not limited to, any drugs or medications which are available to the public without a prescription from a health care provider, prescription drugs or medications, any form or type of narcotic drugs, marijuana, stimulants, depressants or hallucinogens.
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> (B) In the case of drugs or medications which are available to the public without a prescription from a health care provider and prescription drugs or medications, compensation shall not be denied if the employee can show that such drugs or medications were being taken or used in therapeutic doses and there have been no prior incidences of the employee's impairment on the job as the result of the use of such drugs or medications within the previous 24 months.
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> (C) It shall be conclusively presumed that the employee was impaired due to alcohol or drugs if it is shown that, at the time of the injury, the employee had an alcohol concentration of .04 or more, or a GCMS confirmatory test by quantitative analysis showing a concentration at or above the levels shown on the following chart for the drugs of abuse listed:

	Confirmatory test cutoff levels (ng/ml)
Marijuana metabolite[1]	15
Cocaine metabolite[2]	150
Opiates:	
Morphine	2000
Codeine	2000
6-Acetylmorphine[4]	10 ng/ml
Phencyclidine	25
Amphetamines:	

[14] See *Poole v. Earp Meat Co.*, 242 Kan. 638, Syl. ¶4, 750 P.2d 1000 (1998).

Amphetamine	500
Methamphetamine[3]	500

[1] Delta-9-tetrahydrocannabinol-9-carboxylic acid.

[2] Benzoylecgonine.

[3] Specimen must also contain amphetamine at a concentration greater than or equal to 200 ng/ml.

[4] Test for 6-AM when morphine concentration exceeds 2,000 ng/ml.

(D) If it is shown that the employee was impaired pursuant to subsection (b)(1)(C) at the time of the injury, there shall be a rebuttable presumption that the accident, injury, disability or death was contributed to by such impairment. The employee may overcome the presumption of contribution by clear and convincing evidence.

(E) An employee's refusal to submit to a chemical test at the request of the employer shall result in the forfeiture of benefits under the workers compensation act if the employer had sufficient cause to suspect the use of alcohol or drugs by the claimant or if the employer's policy clearly authorizes post-injury testing.

(2) The results of a chemical test shall be admissible evidence to prove impairment if the employer establishes that the testing was done under any of the following circumstances:

(A) As a result of an employer mandated drug testing policy, in place in writing prior to the date of accident or injury, requiring any worker to submit to testing for drugs or alcohol;

(B) during an autopsy or in the normal course of medical treatment for reasons related to the health and welfare of the injured worker and not at the direction of the employer;

(C) the worker, prior to the date and time of the accident or injury, gave written consent to the employer that the worker would voluntarily submit to a chemical test for drugs or alcohol following any accident or injury;

(D) the worker voluntarily agrees to submit to a chemical test for drugs or alcohol following any accident or injury; or

(E) as a result of federal or state law or a federal or state rule or regulation having the force and effect of law requiring a post-injury testing program and such required program was properly implemented at the time of testing.

(3) Notwithstanding subsection (b)(2), the results of a chemical test performed on a sample collected by an employer shall not be admissible evidence to prove impairment unless the following conditions are met:

(A) The test sample was collected within a reasonable time following the accident or injury;

> (B) the collecting and labeling of the test sample was performed by or under the supervision of a licensed health care professional;
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> (C) the test was performed by a laboratory approved by the United States department of health and human services or licensed by the department of health and environment, except that a blood sample may be tested for alcohol content by a laboratory commonly used for that purpose by state law enforcement agencies;
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> (D) the test was confirmed by gas chromatography-mass spectroscopy or other comparably reliable analytical method, except that no such confirmation is required for a blood alcohol sample;
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> (E) the foundation evidence must establish, beyond a reasonable doubt, that the test results were from the sample taken from the employee; and
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> (F) a split sample sufficient for testing shall be retained and made available to the employee within 48 hours of a positive test.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[15] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

ANALYSIS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed in all respects.

On September 19, 2011, claimant sustained personal injury by accident arising out of and in the course of his employment as those terms are defined in K.S.A. 2011 Supp. 44-508(d)(e) and (f). The real issue on this review is whether respondent sustained its burden of proving that claimant's claim should be denied based on the intoxication provisions quoted above. The Board has jurisdiction of the issues raised by respondent pursuant to K.S.A 2011 Supp. 44-534a(a)(2).

Respondent argues that "claimant's accident was the result of unsafe conditions created by the claimant himself, and not due to any work related injury."[16] That assertion is not supported by the evidence and, even if it were, the fault of claimant and respondent is generally immaterial when determining compensability. Workers Compensation is based

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[15] K.S.A. 2011 Supp. 44-534a.

[16] Respondent's Brief at 3 (filed February 6, 2012).

on the theory of taxing the industry for the loss sustained by accidental injury to a worker while employed in such industry, and compensation is to be paid regardless of the negligence of the employer or the fault of the worker.[17]

The record does not support the notion that claimant refused to submit to a chemical drug test. On the contrary, the evidence supports the conclusion that claimant did in fact submit to a drug test while he was hospitalized on the date of injury, although nobody from AMS testified. Julie Joy testified that claimant refused, more than once, to allow his blood to be taken by the AMS representative. However, Ms. Joy was not present in the hospital when claimant's alleged refusal(s) occurred. Claimant does not remember his blood being taken, which is perfectly understandable given the acute nature of claimant's injuries and the strong narcotic pain medication he was provided by the hospital. Moreover, claimant's brother, who was in claimant's hospital room on the day of accident, testified that claimant was less than coherent when the blood sample was taken in the late afternoon or evening. He say no refusal to allow blood to be taken. Claimant was in severe pain when he arrived at the hospital by ambulance. It is improbable that claimant refused a blood test, considering his condition on the morning of September 19, 2011.

Further, evidence from the lab retained by respondent, AMS, is in conflict with Ms. Joy's testimony. An undated letter from AMS, which was evidently faxed to claimant's counsel on December 5, 2011, states:

> On Monday September 19, 2011 at 9:41 Tina from Joy Masonry called and asked that we go over to Wesley ER and collect a Blood Drug Screen for a post accident on Layne Eberle. We sent a phlebotomist over to Wesley and they told us we could not draw the patient. My phlebotomist came back and we called Joy Masonry to let them know. Tina from Joy Masonry called at 11:30 on 9/19/11 and said to wait for a while as the patient was getting an x-ray. The phlebotomist went back later and the Blood Drug Screen was collected.[18]

That letter does not indicate that claimant refused a blood test. Rather, the letter indicates that "they told us" that blood could not be drawn. The record does not reveal who "they" were, but clearly the letter does not say that claimant refused a blood test. AMS called respondent and was told by Tina, who Julie Joy identified as her assistant, "to wait for awhile as the patient was getting an x-ray." The medical records indicate that claimant underwent numerous radiographic studies on September 19, 2011, which likely did not occur in claimant's room. In short, the letter from AMS does not corroborate Ms. Joy's testimony. Rather, it impairs her credibility as a witness.

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[17] See, e.g., *Welden v. Edgar Zinc Co.*, 129 Kan. 422, 283 Pac. 618 (1930).

[18] P.H. Trans., Resp. Ex. 3.

The drug testing results offered into evidence by respondent show levels of marijuana and methadone below the thresholds set forth in K.S.A. 2011 Supp. 44-501(b)(1)(C). Hence, there is no presumption of impairment. The competence of Ms. Joy to testify as an expert on the effects of marijuana and methadone is questionable at best.

Claimant was not impaired by the drugs found in his system on the date of accident. Claimant testified that he was not impaired on the date of accident and that testimony was corroborated by both Lee Eberle and Christopher Maxfield. Ms. Joy's testimony that she believed claimant was impaired on the date of accident is speculative and therefore lacking in credibility. She was not present when the accident occurred. Ms. Joy claims that she talked with several people by telephone who told her that claimant was not acting normally on the morning of the accident but she could not name any of those people. Respondent called no witnesses other than Ms. Joy to establish that claimant was impaired.

In order to successfully prove a so-called intoxication defense, it must be established that the employee's use or consumption of alcohol or drugs contributed to the employee's injury. Respondent has not sustained its burden to show such contribution.

CONCLUSIONS

(1) Claimant sustained personal injury by accident arising out of and in the course of his employment with respondent on September 19, 2011.

(2) Respondent has not proven that claimant was impaired by his use or consumption of drugs on the date of accident, nor has respondent proven that claimant's use or consumption of drugs contributed to claimant's injury.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge John D. Clark dated January 10, 2012, is affirmed in all respects.

IT IS SO ORDERED.

Dated this _____ day of April 2012.

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HONORABLE GARY R. TERRILL
BOARD MEMBER

c: Paul V. Dugan, Jr., Attorney for Claimant
Timothy A. Emerson, Attorney for Respondent and its Insurance Carrier
John D. Clark, Administrative Law Judge